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# GARA AND THE COLLATERAL ORDER DOCTRINE: AFTER THE THIRD CIRCUIT'S DECISION IN *ROBINSON V. HARTZELL PROPELLERS*

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THE GENERAL AVIATION Revitalization Act (GARA) is a powerful statute of repose, shielding the manufacturers of aviation products from liability against claims arising more than eighteen years after the product in question was manufactured.[1] According to the Ninth Circuit, "the GARA statute of repose . . . creates an explicit statutory right not to stand trial which would be irretrievably lost should [the defendant] be forced to defend itself in a full trial."[2] On that basis, the court determined that—under the collateral order doctrine—immediate appellate jurisdiction existed over a lower court's denial of a dispositive motion to dismiss under the GARA's statute of repose.[3]

Nevertheless, the Third Circuit recently held that the GARA's statute of repose did not qualify for immediate appeal under the collateral order doctrine.[4] In *Robinson v. Hartzell Propeller, Inc.*, the court found that the circuit's "historical reluctance" to expand the collateral order doctrine—coupled with factual questions in the underlying matter the court believed were not separable from the merits—mitigated against exercising interlocutory appellate jurisdiction over the denial of a dispositive

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[1] 49 U.S.C. § 40101 note (2000).

[2] Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1110 (9th Cir. 2002).

[3] *Id.* at 1111.

[4] Robinson v. Hartzell Propeller, Inc., 454 F.3d 163, 174 (3d Cir. 2006).

GARA motion.[5] Ironically, within two months of the *Robinson* decision, the Supreme Court of Pennsylvania applied the collateral order doctrine to the GARA and, following the Ninth Circuit's rationale, accepted an immediate appeal of a denied motion for summary judgment.[6]

This seeming contradiction therefore begs the question: What exactly is the collateral order doctrine and when does it apply, if at all, to the GARA?

## I. THE EVOLUTION OF THE COLLATERAL ORDER DOCTRINE

Pursuant to 28 U.S.C. § 1291, a circuit court has jurisdiction to hear an appeal where a "final order" has been rendered by a district court.[7] Most jurisdictions consider an order to be "final" when it "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."[8] The denial of a motion for summary judgment is not typically considered a "final order" because "far from finally deciding the case, it is a decision to permit the litigation to continue."[9]

Long ago, however, the U.S. Supreme Court recognized that certain non-final orders exist "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[10] The collateral order doctrine eventually evolved from *Cohen*, and now permits an immediate appeal of a non-final order if the order: (1) conclusively determines a disputed legal question; (2) resolves an important issue completely separable from the merits of the action; and (3) is effectively unreviewable on appeal from the ultimate final judgment.[11]

Certain issues indisputably qualify under this test, and dispositive motions based on these issues are subject to the collateral

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[5] *Id.*

[6] *See* Pridgen v. Parker Hannifin Corp., 905 A.2d 422, 423–24 (Pa. 2006).

[7] 28 U.S.C. § 1291 (2000).

[8] Richerson v. Jones, 551 F.2d 918, 922 (3d Cir. 1977) (quoting St. Louis, Iron Mountain, & S. Ry. Co. v. S. Express Co., 108 U.S. 24, 28–29 (1883)).

[9] Hamilton v. Leavy, 322 F.3d 776, 782 (3d Cir. 2003).

[10] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[11] Bell Atl.-Pa. Inc. v. Pa. Pub. Util. Comm'n, 273 F.3d 337, 342–43 (3d Cir. 2001).

order doctrine. These issues typically implicate constitutional rights, statutory provisions, or compelling public privacy.[12] Conversely, orders denying motions that are important, but nevertheless do not rise to the narrow standard articulated by the *Cohen* Court and its progeny are universally denied collateral order appellate status.[13]

Between the clear lines of black and white described above, other issues are murkier and have resulted in jurisdictional splitting on whether the collateral order doctrine is available in such circumstances. These grey-area issues include the attorney-client privilege and civil contempt sanctions, with different circuit courts reaching different decisions on whether an immediate appeal is available.[14]

## II. THE GARA AS AN INTERLOCUTORY APPEAL: YES, NO, OR SOMETIMES?

Because the U.S. Supreme Court has not yet opined on the applicability of the collateral order doctrine to the GARA, *Estate of Kennedy v. Bell Helicopter Textron, Inc.*[15]—which broadly permits interlocutory appeals under the GARA—was the definitive case on this issue until recently. With the Third Circuit's recent refusal to exercise appellate jurisdiction over a denied GARA mo-

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[12] *See, e.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993) (discussing Eleventh Amendment immunity); Nixon v. Fitzgerald, 457 U.S. 731, 742–43 (1982) (discussing absolute immunity); Helstoski v. Meanor, 442 U.S. 500, 506–07 (1979) (discussing the Speech or Debate Clause); Abney v. United States, 431 U.S. 651, 662 (1977) (discussing double jeopardy).

[13] *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868–69 (1994) (finding no interlocutory appeal on orders denying motion based on a defense of accord and satisfaction); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 500–01 (1989) (finding no interlocutory appeal of order denying motion based on a defense of a contractual choice-of-venue provision); Van Cauwenberghe v. Biard, 486 U.S. 517, 526–27 (1988) (finding no interlocutory appeal on orders denying motion to dismiss for lack of personal jurisdiction).

[14] *See, e.g.*, Ford Motor Co. v. Ford Motor Co., 110 F.3d 954, 960–61 (3d Cir. 1997) (holding that the attorney-client privilege is the type of "institutionally significant status or relationship" that justifies collateral order review); *but cf.* Texaco, Inc. v. La. Land & Exploration Co., 995 F.2d 43, 43–44 (5th Cir. 1993) (holding that the collateral order doctrine is inapplicable to discovery orders involving claims of attorney-client privilege). *See also* FDIC v. Ogden Corp., 202 F.3d 454, 459–60 (1st Cir. 2000) (holding that civil contempt sanction can be appealed on interlocutory basis); *but cf.* Byrd v. Reno, 180 F.3d 298, 300 (D.C. Cir. 1999) (holding that a civil contempt citation is not appealable as a collateral order).

[15] 283 F.3d 1107 (9th Cir. 2002).

tion in *Robinson*, a reconsideration of the applicability of the doctrine to the GARA is now necessary.

### A. *ESTATE OF KENNEDY V. BELL HELICOPTER TEXTRON*

he *Estate of Kennedy* case arose due to a helicopter that crashed while conducting aerial logging in the state of Washington as the result of fatigue cracking in a component of the aircraft's tail boom.[16] The aircraft's manufacturer filed a motion to dismiss on summary judgment, arguing that the helicopter had been produced over twenty-six years prior to the crash, making the manufacturer immune from suit under the GARA.[17] The plaintiff argued that the GARA eighteen-year repose period did not begin to run until the aircraft, which had formerly been sold to and utilized by the Navy, became certificated for civilian use; this certification occurred less than eighteen years prior to the crash.[18] The district court agreed with the plaintiff and denied the GARA motion.[19] The defendant filed a notice of appeal, arguing that an interlocutory appeal was appropriate under the collateral order doctrine.[20]

The Ninth Circuit conducted an analysis of the existence of its appellate jurisdiction, noting that the doctrine was applicable only to a "narrow class of decisions" and should "never be allowed to swallow the general rule that a party is entitled to a single appeal" after final judgment.[21] The court recognized that in order to qualify, the decision at issue "must be conclusive, resolve important questions completely separate from the merits, and render such important questions effectively unreviewable on appeal from a final judgment in the underlying action."[22]

Finding that the first two factors of this standard were clearly met, the appeals court focused on whether the third factor—that an order was essentially unreviewable if not immediately appealed—was satisfied.[23] Relying on the U.S. Supreme Court for guidance, the Ninth Circuit recognized that "the deprivation of the right not to be tried satisfie[d] the third collateral order

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[16] *Id.* at 1109.
[17] *Id.* at 1112.
[18] *Id.*
[19] *Id.* at 1109.
[20] *Id.* at 1109–10.
[21] *Id.* at 1110.
[22] *Id.*
[23] *Id.*

condition when the right is created by an explicit statutory . . . guarantee that trial will not occur."[24] Reviewing the express language of the statute, the court found that the GARA satisfied this requirement because it "lift[ed] the requirement that manufacturers abide the possibility of litigation for the indefinite future when they sell an airplane."[25]

The court distinguished a statute of repose from a statute of limitation (for which interlocutory appeals are not available) and stated that the "focus of a statute of repose is entirely different from the focus of a statute of limitation[ ]."[26] A statute of limitation merely creates a safeguard against delinquent suits, while a statute of repose recognizes that it is unfair to force a party to defend itself long after the product in question was manufactured.[27] The court stated that "[i]t is clear that an essential aspect of the GARA statute of repose is the right to be free from the burdens of trial," and, thus found the collateral order doctrine applied.[28]

### B. *ROBINSON V. HARTZELL PROPELLER*

The case of *Robinson v. Hartzell Propeller, Inc.*[29] arose from the crash of a small aircraft which was equipped with a propeller manufactured by the defendant twenty-five years before the accident and thus warranted protection by the GARA's eighteen year statute of repose.[30] Nevertheless, the plaintiff argued that the GARA was not applicable because the defendant allegedly made several material misrepresentations to the FAA when obtaining a type certificate for the propeller, thus triggering an exception to the GARA's statute of repose for crashes proximately caused by such misrepresentations.[31] The district court agreed with the plaintiff and denied the defendant's GARA motion, and the defendant subsequently appealed to the Third Circuit, citing *Estate of Kennedy* as precedent for the proposition that

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[24] *Id.* (citing Midland Asphalt Corp. v. United States, 489 U.S. 794, 800–01 (1989)).

[25] *Id.* at 1110–11 (citing Lyon v. Agusta S.P.A., 252 F.3d 1078, 1089 (9th Cir. 2001) (emphasis omitted)).

[26] *Id.* at 1111.

[27] *See id.*

[28] *Id.*

[29] 454 F.3d 163 (3d Cir. 2006).

[30] *Id.* at 165.

[31] *Id.*

an interlocutory appeal was appropriate in these circumstances.[32]

The Third Circuit opined that the "key consideration . . . [is] whether the claimed right sought to be protected was characterized as a right to immunity from suit or a defense to liability."[33] If it is the former, an interlocutory appeal is generally appropriate; if it is the latter, only a single appeal at the conclusion of the litigation is typically permitted.[34]

In applying this analysis to the GARA, the Third Circuit found that it could not exercise appellate jurisdiction on this particular issue.[35] First, the court disagreed with the *Estate of Kennedy* analysis and found parallels between the GARA's statute of repose language and the language in the federal default statute of limitations, 28 U.S.C. § 1658.[36] The court found that the GARA is more similar to a statute of limitation than to a grant of qualified immunity as "both are designed primarily to protect private parties from liability on stale claims."[37] The court also found that the GARA's statute of repose "is not a pure immunity because it contains exceptions under which immunity does not attach," and stated that the immunities that the collateral order doctrine is designed to protect should have no such exceptions.[38] The *Robinson* decision also went a step further and, relying on the U.S. Supreme Court's ruling in *Cohen*, stated that the collateral order doctrine will apply in cases of claimed immunity only where the order "turns on an issue of law," as opposed to fact, because where a fact is at issue, the immunities issue is not "completely separate from the merits."[39]

### C. *Pridgen v. Parker Hannifin*

Just a month after the *Robinson* decision was handed down by the Third Circuit (sitting in Pennsylvania), the Pennsylvania Supreme Court issued its decision in *Pridgen v. Parker Hannifin Corp.*, finding that an appeal of a GARA decision fell under the collateral order doctrine.[40] While the Pennsylvania Supreme

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[32] *Id.* at 167–68, 172.
[33] *Id.* at 171.
[34] *See id.* at 171–72.
[35] *Id.* at 165.
[36] *Id.* at 172–73.
[37] *Id.* at 173.
[38] *Id.*
[39] *Id.*
[40] Pridgen v. Parker Hannifin Corp., 905 A.2d 422, 434 (Pa. 2006).

Court accepted that its decision reflected a "respectful disagreement" with the Third Circuit's ruling in *Robinson*, it also distinguished the respective courts' reasoning on certain critical points.[41]

Most importantly, unlike in *Robinson*, the appeal in *Pridgen* arose mainly from the GARA's "rolling provision," which restarts the eighteen-year repose period for components installed after the original manufacture date.[42] *Pridgen* involved a thirty-one-year-old Piper aircraft that crashed on departure, killing several people.[43] The complaint alleged that the crash was caused by components which had been replaced within the eighteen-year repose period and that there were misrepresentations made to the FAA, thereby implicating the "fraud on the FAA" exception to the GARA.[44]

The *Pridgen* court found that the matter met the criteria articulated by the *Cohen* decision such that the collateral order doctrine applied.[45] First, the court found that in order to settle the legal dispute at the heart of the appeal, the appellate court's "frame of reference will be centered on the terms of GARA, not on determinations of fact."[46] Second, in terms of importance, the court recognized the importance of the matter, because in passing GARA, Congress "was concerned with exposure of covered aviation manufactures to both liability in damages and associated litigation costs."[47] Finally, the court found that the costs of defending a complex litigation comprised a "sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest."[48]

The *Pridgen* court agreed with the Third Circuit's reasoning in *Robinson*, however, that interlocutory appeals are typically appropriate only when they implicate strict questions of law, not fact.[49] Such rationale comports with the U.S. Supreme Court's ruling

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41 *Id.*

42 *See id.* at 432.

43 *Id.* at 425.

44 *See id.*

45 *Id.* at 426, 433–34.

46 *Id.* at 433.

47 *Id.*

48 *Id.*

49 *See id.* at 434.

in *Johnson v. Jones*.[50] While the facts underlying the *Pridgen* plaintiff's claims in relation to the "fraud in the FAA" exception were not implicated in the appeal, dicta suggests that to the extent an underlying order denied a GARA claim on the basis of a factual dispute related to this exception, it may not fall under the limited holding in *Pridgen*.[51]

## III. CONCLUSION

The two recent decisions out of Pennsylvania federal and state appellate courts neither foreclose interlocutory appeals from an adverse GARA order, nor confirm the applicability of the collateral order doctrine to all GARA orders. Rather, they continue on the path of interpretation of the U.S. Supreme Court's decision in *Cohen* and its progeny. While the *Estate of Kennedy* case in the Ninth Circuit and *Robinson* in the Third Circuit are not in alignment, they do not completely contradict each other. Rather, read together, the cases seem to suggest a middle ground by which GARA orders denying dispositive motions may ultimately be appealable through the collateral order doctrine if they address issues that are solely legal and do not require an analysis of factual decisions.

Ultimately, this split of authority between the circuits may eventually result in the U.S. Supreme Court handing down a decision on the issue. The Court has not addressed the collateral order doctrine for some years, and it may be time for the doctrine to be considered by the highest court in the context of the GARA. Until that time, both *Robinson* and *Pridgen* will likely provide foundation to both plaintiffs and defendants in their continuing efforts to avoid and utilize, respectively, the GARA, at both the trial and appellate levels.

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[50] See Johnson v. Jones, 515 U.S. 304, 314–15 (1995), for the U.S. Supreme Court's analysis of qualified immunity in a § 1983 suit against police officers for excessive use of force.

[51] *See Pridgen*, 905 A.2d at 437.